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11  
 12 **IN THE UNITED STATES BANKRUPTCY COURT**  
 13 **DISTRICT OF NEVADA – LAS VEGAS**

14 THE LENDERS PROTECTION GROUP; CHARLES  
 15 B. ANDERSON TRUST; RITA P. ANDERSON  
 16 TRUST; BLATES CO.; KEHL FAMILY MEMBERS;  
 MOJAVE CANYON, INC.,

17 Appellants,

18 v.

19 USA COMMERCIAL MORTGAGE CO., et al.,

20 Appellees.

21 Case No. 2:07-CV-00072-RCJ

22 **DECLARATION OF SUSAN M.**  
**SMITH IN SUPPORT OF**  
**APPELLEE-DEBTORS'**  
**OPPOSITION TO "MOTION**  
**FOR LIMITED APPELLANTS'**  
**STAY PENDING APPEAL"**

23 Case No. BK-S-06-10725 LBR  
 Case No. BK-S-06-10726 LBR  
 Case No. BK-S-06-10727 LBR  
 Case No. BK-S-06-10728 LBR  
 Case No. BK-S-06-10729 LBR

24 Chapter 11

25 Jointly Administered Under  
 Case No. BK-S-06-10725 LBR

26 In re:

27 USA COMMERCIAL MORTGAGE CO.; USA  
 CAPITAL REALTY ADVISORS, LLC; USA  
 CAPITAL DIVERSIFIED TRUST DEED FUND,  
 LLC; USA CAPITAL FIRST TRUST DEED FUND,  
 LLC, and USA SECURITIES, LLC,

28 Debtors.

1 I, Susan M. Smith, hereby declare and state as follows:

2 1. On April 13, 2006 ("Petition Date"), USA Commercial Mortgage Company  
 3 ("USACM"), USA Capital Realty Advisors, LLC, USA Capital Diversified Trust Deed Fund,  
 4 LLC ("DTDF"), USA Capital First Trust Deed Fund, LLC ("FTDF" and together with DTDF, the  
 5 "Funds"), and USA Securities, LLC (collectively, the "Debtors") filed petitions seeking relief  
 6 under Chapter 11 of the Bankruptcy Code. By order entered on June 9, 2006, the Court approved  
 7 the joint administration of the Debtors' Chapter 11 cases.

8 2. Effective as of the Petition Date, Mesirow Financial Interim Management, LLC  
 9 ("Mesirow") has been employed as crisis managers for the Debtors, and Thomas J. Allison of  
 10 Mesirow has served as the Debtors' Chief Restructuring Officer. I am employed by Mesirow as a  
 11 Senior Vice President, and I have worked extensively for the Debtors and have overseen  
 12 substantial aspects of these cases under Mr. Allison's direction.

13 3. This Declaration is based on my personal knowledge or, if so stated, upon  
 14 information and belief. Thus, all matters set forth in this Declaration are based on (a) my personal  
 15 knowledge, (b) my review of relevant documents and records, (c) my view, based upon my  
 16 experience and knowledge of the Debtors' business and financial condition, and/or (d) as to  
 17 matters involving United States bankruptcy law or rules, my reliance on advice of bankruptcy  
 18 counsel to the Debtors. If I were called upon to testify, I could and would testify competently to  
 19 the facts set forth herein.

#### CASE BACKGROUND

20 4. The Debtors' Plan of Reorganization (the "Plan") was confirmed by the  
 21 Bankruptcy Court by an order entered January 8, 2007 (the "Confirmation Order").

22 5. The closing of the sale of assets of FTDF and USACM to Compass Partners, LLC  
 23 ("Compass") pursuant to the Plan and Confirmation Order took place on February 16, 2007. The  
 24 "Effective Date" of the Plan has not yet occurred.

25 6. Prior to April, 2006, USACM regularly made payments to the Funds and Direct  
 26 Lenders (collectively, the "Lenders") each month regardless of whether the particular loans

1 relating to each Lender were performing or nonperforming. Prior to the Petition Date, Lenders  
 2 received approximately \$39.5 million in interest and/or principal payments that they were not  
 3 entitled to receive at the time the payments were made (defined as "Prepaid Interest" in the Plan).  
 4 As more fully set forth in prior declarations of Thomas J. Allison filed in the Debtors' jointly  
 5 administered case, the money to make these wrongful payments came from a variety of  
 6 commingled sources, including, among other sources, from principal payments made, but not  
 7 remitted by USACM, on certain loans ("Unremitted Principal").

8       7. After Mr. Allison's appointment as the Chief Restructuring Officer of the Debtors,  
 9 Mr. Allison directed that I and other Mesirow professionals work on behalf of the Debtors to  
 10 reconstruct the books and records of the Debtors, which, as set forth in Mr. Allison's prior  
 11 declarations, were incorrect and incomplete, and which appeared, in certain circumstances, to be  
 12 intentionally inaccurate.

13       8. As a result of the reconstruction of the books and records of the Debtors, on or  
 14 around late June and early July 2006, investor statements were sent to all Lenders setting forth the  
 15 amount of "Prepaid Interest" paid to each Lender and the amount of Unremitted Principal for each  
 16 Lender, which also have been referred to as "Lender Statements."

17       9. As a further result of the reconstruction of the books and records of the Debtors,  
 18 pursuant to the Debtors' Motion to Hold Funds and Motion to Distribute filed, heard and granted  
 19 by the Court, the Debtors held back and continue to hold back from all distributions made to  
 20 Lenders after the Petition Date interest collected from Borrowers that had already been paid to the  
 21 Lenders on the loans pre-petition, and netted amounts to recoup Prepaid Interest paid to the  
 22 Lenders pre-petition from collections made post-petition on performing loans that would  
 23 otherwise payable to the Lenders (the "Prepaid Interest Collections"). Under the Asset Purchase  
 24 Agreement approved in the Confirmation Order, Compass is required to continue the Prepaid  
 25 Interest Collections for the benefit of the USACM estate after the closing of any sale to Compass.  
 26  
 27  
 28

1        10. The Disclosure Statement and Plan provided notice that the Prepaid Interest  
2 Collections would, as part of the confirmation of the Plan and the compromises with the Direct  
3 Lenders incorporated in the Plan, be determined to be property of the USACM estate for  
4 distribution to all creditors in that estate in accordance with the priorities set forth in the  
5 Bankruptcy Code and that if any Direct Lender objected to this treatment, they would have to file  
6 and prevail on an objection to the Plan.

7        11.      Appellants did not request any discovery as to the issues surrounding the Prepaid  
8      Interest Collections, the treatment of the Prepaid Interest Collections in the Plan, the compromise  
9      involving the Prepaid Interest Collections included in the Plan, or any alleged claim that any of the  
10     Appellants might make to any portion of the Prepaid Interest Collections.

11       12. Appellants did not present any evidence as to the issues surrounding the Prepaid  
12 Interest Collections, the treatment of the Prepaid Interest Collections in the Plan, the compromise  
13 involving the Prepaid Interest Collections included in the Plan, nor did Appellants identify or  
14 present evidence on any claim that any of the Appellants might have to any portion of the Prepaid  
15 Interest Collections. Consequently, when Appellants refer to “Segregated Funds” held on their  
16 behalf, I am unsure as to what funds this refers other than the entire amount of USACM’s \$37.1  
17 million held in the USACM Collection Account that is recognized as property of the USACM  
18 estate under the terms of the confirmed Plan and the Confirmation Order, as described below.

### **IDENTITIES OF APPELLANTS**

13. I am familiar with and have custody of the Debtors' books and records, including  
all records related to the identity of Direct Lenders and the identity of entities holding membership  
interests in FTDF and DTDF.

23       14. I have reviewed (1) the Statement of the Law Offices of Alan R. Smith Pursuant to  
24 Bankruptcy Rule 2019 filed December 6, 2006 in the Bankruptcy Court, including the Exhibit A  
25 thereto (“Initial 2019 Statement”); and (2) the First Amended Statement of the Law Offices of  
26 Alan R. Smith Pursuant to Bankruptcy Rule 2019 filed December 18, 2006, including Exhibit A  
27 thereto (“Amended 2019 Statement”) (collectively, the “Statements”).

1       15. There were only approximately 111 names listed on the Initial 2019 Statement, but  
 2 the Amended 2019 statement contains approximately 295 names, including 12 duplicate names.

3       16. No account numbers are provided for any of the entities listed in the Statements.  
 4 The Initial 2019 Statement does not purport to identify entities by a legal “vesting name,” and  
 5 although Exhibit A to the Amended 2019 Statement makes reference to “Account/Vesting Name,”  
 6 many of the entities listed therein are not identified by their respective legal vesting names.  
 7 “Vesting names” are the names of the actual parties to the governing legal documents through  
 8 which investors invested in loans serviced by USACM and/or in membership interests in DTDF  
 9 and/or FTDF, and are the names by which USACM’s investor records are kept. As a result, it is  
 10 very difficult to ascertain with any certainty the exact relationship to the Debtors (if any) of many  
 11 of the entities listed in the Statements. For example, in many instances, only an individual’s name  
 12 is listed in the Statements and the Debtors have no record of that individual name being a current  
 13 Direct Lender on any loan serviced by USACM. Some individual names may potentially be  
 14 associated with several vesting names. The ability to identify the entities listed in the Statements  
 15 is complicated by the fact that Mr. Smith states in the Amended 2019 Statement that the entities  
 16 listed in Exhibit A thereto “are not limited to the names listed therein, but may also include  
 17 various other entities in which those members own or control, and/or their successors and  
 18 assigns.” For all of these reasons, the Debtors cannot conclusively identify many of the entities  
 19 listed in the Statements.

20       17. Some of the entities listed in the Statements that Mesirow can identify are actually  
 21 not Direct Lenders, but rather are members only having equity interests in FTDF or DTDF.  
 22 Further, as noted above, it appears that some of the entities listed in the Statements are neither  
 23 current Direct Lenders nor members of either of the Funds.

24       18. Mesirow reconstructed the Debtors’ records, and on or about June 30, 2006,  
 25 USACM mailed to each Direct Lender an initial “Lender Statement.” Following the transmission  
 26 of the initial Lender Statements, Lender Statements were mailed to each Direct Lender generally  
 27 on a monthly basis. In each of these Lender Statements, the Debtors itemized for each Direct

1 Lender the amount of "Prepaid Interest" (as defined in the Plan) that was attributed to their  
 2 respective accounts, and if applicable, and the amount of "Unremitted Principal" attributed to the  
 3 Direct Lender (not all Direct Lenders had Unremitted Principal). A procedure was set up for  
 4 Direct Lenders to inquire if they believed that any information in their Lender Statements was  
 5 inaccurate. All such inquiries were followed up on by employees of USACM or Mesirow  
 6 personnel serving as financial consultants to USACM.

7       19.     The Statements do not indicate which entities listed thereon have "Unremitted  
 8     Principal" claims, or which such entities received improper prepetition payments from USACM.  
 9     But, based on the limited information that has been provided in the Statements, upon information  
 10    and belief, I believe that Appellants include both Direct Lenders with Unremitted Principal claims  
 11    and Direct Lenders who received Prepaid Interest yet do not have Unremitted Principal claims, as  
 12    well as Direct Lenders who have neither.

13       20.    I am familiar with and have reviewed the two Affidavits filed by the Debtors'  
 14    balloting agent, BMC Group, regarding the ballots that were cast to accept or reject the Plan  
 15    (Docket nos. 2165 and 2243). The Statements, which purport to list names of parties who desire  
 16    to appeal the Confirmation Order, include names of at least fourteen entities who voted to accept  
 17    the Plan.

18       21.    I attended the hearing in the U.S. District Court on the Debtors' emergency motion  
 19    to quash the temporary stay pending appeal that had been granted by the Ninth Circuit Bankruptcy  
 20    Appellate Panel before this appeal was transferred to the District Court. After the hearing, at which  
 21    the District Court vacated the stay, the Debtors' counsel, Annette Jarvis, and I approached counsel  
 22    for the Appellants and informed them, among other things, that the Debtors could not identify  
 23    many of the entities listed in the Statements because, in many instances, vesting names had not  
 24    been used, and Ms. Jarvis and I requested that Appellants' counsel, Mr. Alan Smith, provide the  
 25    Debtors with further information on the appealing parties. Despite this request, no information  
 26    regarding the identities of those who purportedly are part of the "Lenders Protection Group" has  
 27    been provided to the Debtors. Also, no formal or informal discovery has been served on the  
 28

1 Debtors by Mr. Smith or his firm relating his assertion in the Statements that the total loans made  
 2 by the entities listed in the Statements is unknown "due to incomplete records received from the  
 3 Debtors[,] and that he is in the "process of gathering as much information as possible concerning  
 4 the loans made by the members of the group. . . ."

5 **THE ALLEGED "SEGREGATED FUNDS"**

6 22. Appellants have incorrectly asserted that the following three categories of funds,  
 7 defined by Appellants as "Segregated Funds," are being held by USACM in its Collection  
 8 Account: "(A) a 1 % servicing fee to USACM's [sic] and other fees and costs it is entitled to  
 9 charge; (B) an additional 2 % of principal on all loans that were fully paid off post petition; and  
 10 (C) an amount equivalent to the Prepaid Interest each Direct Lender received." Motion for  
 11 Limited Stay Pending Appeal at 5. Appellants' definition of "Segregated Funds" does not  
 12 accurately track the actual language of the "Distribute/Hold Order" that they attempt to  
 13 paraphrase, and in any event, the 1% servicing fees indisputably belong to USACM. Furthermore,  
 14 USACM is not holding the 1 % servicing fees it is entitled to charge in the Collection Account,  
 15 because subsequent rulings and orders of the Court, such as the Court's "Order Approving  
 16 Debtors' Continued Use of Cash" (Docket no. 1282) entered September 14, 2006, have authorized  
 17 USACM to transfer these loan servicing fees from its Collection Account to its Operating Account  
 18 and to use such funds in the post-petition operation of its business and administration of its estate,  
 19 and USACM has done so.

20 23. The funds addressed by the "Distribute/Hold Order" that remain in USACM's  
 21 Collection Account are: (a) approximately \$4.8 million, representing a 2 % servicing fee and cost  
 22 holdback above and beyond the 1 % servicing fee indisputably belonging to USACM, which  
 23 holdback is to be distributed to Direct Lenders and USACM on the Effective Date of the Plan  
 24 according to the terms of the Plan; (b) approximately \$15.9 million that has been collected from  
 25 borrowers post-petition on loans for which Direct Lenders received improper pre-petition  
 26 payments from USACM; and (c) an additional amount of approximately \$16.4 million that has  
 27 been collected from borrowers post-petition and netted against improper pre-petition payments

1 that Direct Lenders received on other loans pre-petition from USACM (categories (b) and (c) are  
 2 what constitute the “Prepaid Interest Collections” defined above). Because of the broad definition  
 3 of “Segregated Funds” used in the Stay Motion and the Appellants’ failure to provide information  
 4 that would allow the Debtors to identify the Appellants with any certainty, it appears that they are  
 5 seeking to have the entire sum of these three categories, approximately \$37.1 million, frozen by  
 6 USACM throughout the duration of their appeal. The failure of the Appellants to provide  
 7 information that allows the Debtors to identify them with any certainty also prevents the Debtors  
 8 from attempting to ascertain what, if any, ownership interest any one Appellant is claiming to any  
 9 of the “Segregated Funds.”

10 **DEVASTATING IMPACT OF REQUESTED STAY**

11 24. Thus, the “limited stay” requested by Appellants, if granted, would likely stay the  
 12 distribution of approximately \$37.1 million in cash under the terms of the Plan, which will have a  
 13 devastating impact on the Debtors and all parties in interest in these Chapter 11 cases.

14 25. If the distribution of this cash is delayed, the Plan will not be able to go effective,  
 15 which will create a serious threat of conversion of the Debtors’ Chapter 11 bankruptcy cases to  
 16 Chapter 7 liquidation cases.

17 26. Now that the sale to Compass has closed, USACM no longer has a regular source  
 18 of income and cash on hand will not be sufficient to fund continued administration of the estate,  
 19 including the necessary payment of professionals for the Debtors and the Committees (which are  
 20 not dissolved until the Effective Date of the Plan, and will continue to need to employ  
 21 professionals until their dissolution so as to meet their duties and attend to the myriad of problems  
 22 that will result as a result of the stay), the skeletal crew of employees, and rent.

23 27. Further, USACM will not be able to fund the USACM Trust, one of the two post-  
 24 effective date entities, that is charged under the Plan with pursuing litigation against and recovery  
 25 of assets from the Debtors’ former insiders.

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1       28. Moreover, since the compromise between FTDF and DTDF in the Plan provides  
 2 for the funding of litigation for DTDF through funds loaned by FTDF from its sale proceeds,  
 3 DTDF might not receive funds to pay administrative and other expenses in order to make the Plan  
 4 effective as well as funds to commence litigation for creditor recoveries.

5       29. I believe, because of the intertwined compromises by and among the Debtors'  
 6 estates under the Plan, and the need for funding in these estates, if the Prepaid Interest Collections  
 7 are frozen as Appellants request and are not available to fund the Plan, the entire Plan would  
 8 unwind and could result in a conversion to Chapter 7.

9       30. Without the occurrence of the Plan Effective Date and the consummation of the  
 10 Plan (including the use of the Prepaid Interest Collections) within a short period of time, the  
 11 Debtors do not have sufficient funds to continue operations (excluding professional fees) beyond  
 12 60 days.

13       31. Finally, in the event of a stay, the Debtors' estates would continue to incur  
 14 substantial administrative fees at the average rate of more than \$1 million per month, which the  
 15 estates cannot pay long term. As set forth in a prior Declaration of Thomas J. Allison in  
 16 connection with a motion to convert the Debtors' cases to Chapter 7 liquidation cases as well as  
 17 Mr. Allison's Declaration in support of the confirmation of the Plan, Chapter 7 conversion would  
 18 result in drastically reduced or nominal recoveries, if any, for creditors and investors.

19       32. A stay of the distribution of the Prepaid Interest Collections pursuant to the terms  
 20 of the Plan threatens to unravel the entire Plan. The Debtors' use of the Prepaid Interest  
 21 Collections pursuant to the terms of the compromise with the Direct Lenders as set forth in the  
 22 Plan is intertwined with all other compromises set forth in the Plan. Modification or elimination  
 23 of even one of these interdependent compromises would threaten to unwind and eviscerate the  
 24 foundation of the Plan.

25       33. Accordingly, while the harm caused to the debtors would be so substantial that it  
 26 may be impossible to quantify, in my judgment a bond in the amount of \$37.1 million would be  
 27

1 needed to ensure a source of compensation to the Debtors and their constituents for the substantial  
2 harm that would be caused by the granting of a stay pending appeal. Alternatively, Mesirow  
3 estimates that the expenses of continuing the operations and administration of USACM during the  
4 pendency of this appeal would be approximately \$12.5 million, and therefore any bond would  
5 have to be in at least that amount.

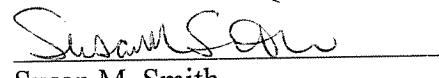
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7 I declare, under penalty of perjury, that the foregoing statements are true and correct to the  
8 best of my knowledge and belief.

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11 EXECUTED this 28th day of February, 2007.

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13 Susan M. Smith

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